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No. 301

In the Supreme Court of the United States

OCTOBER TERM, 1960

INTERNATIONAL HOD CARRIERS' BUILDING AND COMMON LABORERS' UNION OF AMERICA, LOCAL NO. 41, AFL-CIO, PETITIONER

v.

ROSS M. MADDEN, REGIONAL DIRECTOR OF THE THIRTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The findings of fact, conclusions of law and order of the district court (R. 238–244) are not yet reported.[1] The opinion of the court of appeals (Pet. App. A, 1–10) is reported at 277 F. 2d 688.

[1] References designated "R" are to the portion of the record printed as an appendix to the brief filed by petitioner in the court below.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1960. The petition for a writ of certiorari was filed on August 8, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court properly concluded that there was reasonable cause to believe that the petitioner's picketing violated Section 8(b)(4)(C) of the National Labor Relations Act.

2. Whether the district court properly limited the petitioner's efforts to inquire into the scope and nature of the preliminary investigation which preceded the institution of proceedings to enjoin the petitioner's activities.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended, and of the Board's Statements of Procedure effective at the time of the filing of the petition for injunction are set forth in Appendix A, pp. 13–15, *infra*.[2]

STATEMENT

The petitioner challenges an interlocutory injunction issued by the United States District Court for the Northern District of Indiana on June 5, 1959, and affirmed by the court below on May 11, 1960. The district court issued the injunction pursuant to a

[2] The petitioner's reference to the Statements of Procedure neglects the amendments published in the Federal Register on February 12, 1959 (24 F.R. 1096), effective on February 16, 1959. The petition here was filed on May 13, 1959 (R. 11).

petition filed by the respondent, the Regional Director of the Board, under section 10(l) of the National Labor Relations Act, as amended (29 U.S.C. 160(l)).[3] The injunction enjoins, pending a final Board determination,[4] picketing and allied activities by petitioner which there was reasonable cause to believe violated Section 8(b)(4)(C) of the Act. That section (p. 13, *infra*) forbids the inducement of work stoppages for the purpose of forcing or requiring an employer to recognize or bargain with a particular union where another union has been certified by the Board.

A. THE PROCEEDINGS IN THE DISTRICT COURT

1. THE UNFAIR LABOR PRACTICE ISSUE

The evidence produced before the district court showed the following:

In August 1958, Christian Building Trades Local 12 was certified by the Board as collective bargaining representative for the employees of the members of the Calumet Contractors Association doing business in the Calumet-Hammond area. In the fall of 1958, DeJong, a member of the Association, was awarded a contract for the erection of a church in Hammond, Indiana. As general contractor he performed the

[3] This section authorizes the Board's Regional Director, when, after investigation, he "has reasonable cause to believe" that charges alleging a violation of Section 8(b)(4) of the Act are true, to apply to the federal district court "for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter."

[4] On June 14, 1960, the Trial Examiner issued his Intermediate Report recommending that the complaint be dismissed (Pet. App. C, 14–22). Exceptions to this Report were filed, and the matter is now before the Board for final decision.

carpentry and labor work, but subcontracted the remaining work. In November 1958, the petitioner, which had opposed the representation petition of Local 12 before the Board, commenced picketing the construction site with a sign reading as follows:

NOTICE TO PUBLIC
The work being performed
by the following contractors
is not being done by qualified
BUILDING TRADES
CRAFTSMEN
The prevailing rate of pay & conditions
are not being met
This notice is addressed only to
the general public & not to the
employers or employees on the job
GEO. DEJONG &
EMPLOYER MEMBERS OF THE
CALUMET CONTRACTORS ASS'N
LABORS UNION #41
A.F. of L.-C.I.O.

The petitioner stopped the picketing when the construction work was interrupted by inclement weather, but it was resumed on March 12, 1959, when DeJong resumed work. This time the picket also carried a handbill for distribution, which was entitled "Notice to the Public" and stated that it was the sole purpose of the "Patrolling" of the job site to inform the public that the work was not done by "qualified Building Trades Craftsmen" under the prevailing rate of pay. (Pet. App. A, 4–6; R. 39, 41, 50–51, 107–108, 229.)

However, the petitioner made no effort to bring the alleged substandard wages and working conditions to the attention of the public other than by the picket's activities on the job site. The picket usually sat in his car until an employee of a subcontractor or supplier arrived to enter the site, at which time he began patrolling with his sign, either in the front or the rear of the premises, wherever the employee happened to be. Moreover, the names of suppliers were written down in the presence of their employees. These activities had the effect of stopping work by employees of subcontractors and the delivery of supplies to the project. (Pet. App. A, 6–7; R. 87–88, 90, 211–213, 214.)

On the basis of the above facts and the other evidence in the record, the district court concluded that the Regional Director had reasonable cause to believe that the petitioner, by picketing and other means, induced and encouraged employees to engage in concerted refusals to perform services, for an object of forcing or requiring DeJong to recognize and bargain with the petitioner as the representative of his employees although another labor organization had been certified as their representative by the Board (R. 241).

2. THE PROCEDURAL ISSUE

The petition for injunctive relief filed by the Regional Director alleged that the Board had investigated the unfair labor practice charge and "upon the basis of the evidence disclosed as a result of such investigation * * * has reasonable cause to believe and

believes, that [petitioner] engaged in * * * acts and conduct in violation of Section 8(b)(4)(C) of the Act" (Pet. App. A, 2; R. 3). The petitioner, contending that proof of an adequate preliminary investigation was a condition for maintenance of the Section 10(l) proceeding, sought to require the Board's agents to testify concerning the scope, nature and extent of the preliminary investigation and to produce for examination the Board's files and records. The court concluded[5] that matters uncovered in the investigation which preceded the filing of the injunction petition were immaterial and irrelevant to the issues before the court, namely, whether there was reasonable cause to believe the Act had been violated; that issue had to be established by the evidence produced at the hearing and not by information in the mind or file of the Regional Director. Moreover, the Board's regulations (Pet. 6, n. 5) precluded Board agents from disclosing information in the Board's files without the consent of the Board or the General Counsel, and there had been no attempt to obtain such consent here. Accordingly, the Regional Director, who was subpoenaed, was permitted to testify that he was responsible for the investigation of all charges; that the charge in the present case was assigned for investigation and was investigated under his supervision; that letters were sent to the petitioner requesting its position in writing; and that persons assigned to the case interviewed witnesses of the charging party and offered to interview "any witnesses" of the petitioner

[5] The court's ruling is set forth in Appendix B, pp. 16–19, *infra*.

(Pet. App. A, 8; R. 122, 123–124). The court, however, did not require him to answer questions concerning the details of the investigation or his decisional processes, or to produce the Board's files (Pet. App. A, 8; R. 38, 114–115, 122, 124, 127–131, 141–143, 159–160).[6] Other Board agents subpoenaed by the petitioner also testified,[7] but were likewise not required to answer questions regarding the content of the investigation (Pet. App. A, 8). However, the testimony of other witnesses and other evidence in the record revealed that, in the preliminary investigation, Board representatives took a statement from the petitioner's representative, Wynkoop, and interviewed other persons prior to the filing of the petition (Pet. App. A, 8; R. 100, 175–176, 225–226, 231–236).

B. THE PROCEEDINGS IN THE COURT OF APPEALS

Upon appeal, the court below affirmed the district court. The court concluded that, on the evidence before it, the lower court was not "clearly erroneous" in finding that there was reasonable cause to believe that the petitioner had induced the employees of suppliers and subcontractors to stop work for an object prohibited by Section 8(b)(4)(C) of the

[6] The court noted that the Regional Director had already "produced certain of its files without any mandatory ruling to that effect" (Appendix B, p. 18, *infra*). Thus, at the request of the petitioner's counsel, the pretrial affidavits or statements taken by Board agents from witnesses were turned over to the petitioner for use in cross-examination (see R. 225–228, 231–232, 235–236).

[7] The Board's Chief Law Officer (R. 158–159), a Board attorney assigned to investigate the charge (R. 115–117, 148–149), and a field examiner (R. 215–217).

Act, i.e., forcing or requiring DeJong and the other contractor members of the Association to recognize and bargain with the petitioner despite the fact that another union had been certified as the representative of their employees (Pet. App. A, 7–8).

Concerning the procedural issue raised by the petitioner, the court below held that the district court did not err in restricting the inquiry into the preliminary investigation which preceded the institution of Section 10(l) proceeding. The court agreed with the lower court's view that the scope and content of the preliminary investigation were not relevant or material to the issue to be adjudicated in the Section 10(l) proceeding, namely, whether reasonable cause exists to believe a violation has occurred, which issue could only be determined by the evidence adduced in open court to sustain the Board's position (Pet. App. A, 8–9).

ARGUMENT

1. The finding of the district court, sustained by the court below, that there was reasonable cause to believe that the petitioner picketed for an object prohibited by Section 8(b)(4)(C) of the Act raises only an evidentiary question which does not warrant review by this Court. In any event, it is apparent that the district court was not clearly erroneous in finding reason to believe that an object of the petitioner's activity was to force or require DeJong and the other contractor members of the Association to recognize and bargain with it notwithstanding that another labor organization had been certified by the Board as the representative of their employees. Thus, although the

picket sign sought merely to inform the public that wage rates and conditions on the project were below the prevailing scale for building trades craftsmen, the fact that the picket appeared only when employees arrived on the project and went to the rear of the premises when deliveries were being made at that point (p. 5, *supra*) revealed that the picketing was actually designed to induce the employees of neutral subcontractors and suppliers not to work at the picketed premises. With the professed motive of the picketing discredited, the background of the petitioner's prior efforts to block the certification of Local 12 (p. 4, *supra*), the evasive testimony of the petitioner's agent Wynkoop as to what the Union really sought (R. 211–213), and the circumstance that the Association could, as a practical matter, alter the wage scale and working conditions negotiated with the certified union only by repudiating its agreement with that union, ample basis existed for concluding that at least an object of the petitioner's pressure on the Association was to obtain representative status in derogation of the rights of Local 12.*

2. The petitioner misconceives the holding of the district court and the court below on the procedural question in interpreting it (Pet. 12–17) as resting on the ground that the Board is immune from the discovery procedures of the Federal Rules of Civil Procedure. The lower courts refused to permit inquiry

* In view of these factors, there is no substance to the petitioner's contention (Pet. 20) that the district court and the court below departed from established principles by inferring an illegal object from the effect of the picketing alone.

into the content of the Regional Director's preliminary investigation of the charge and the mental processes by which he concluded that injunction proceedings were warranted on the ground that these matters were not relevant or material to the issues before the court (pp. 6, 8, *supra*). No litigant has the right to compel the production of irrelevant or immaterial evidence. See *Hickman* v. *Taylor*, 329 U.S. 495, 507; *Gordon* v. *United States*, 344 U.S. 414, 420; *United States* v. *Procter & Gamble*, 356 U.S. 677, 682–683; Rules 26 and 34, Federal Rules of Civil Procedure.*

The lower courts properly concluded that the matters which the petitioner sought to inquire into were irrelevant and immaterial to the Section 10(l) proceeding. Section 10(l) provides that, whenever a charge alleging a violation of Section 8(b)(4) is filed, it shall be investigated promptly. The type of investigation is not specified. The section merely provides that if, after such investigation, the regional official "has reasonable cause to believe such charge is true and that a complaint should issue," he shall petition the district court for injunctive relief pending a final Board adjudication of the question. And, upon "the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief * * * as it deems just and proper." It is thus apparent from

* *Mitchell* v. *Bass*, 252 F. 2d 513 (C.A. 8) (Pet. 16, n. 13), is distinguishable from the situation here, in that the documents which the Secretary of Labor was ordered to produce under Rule 34, viz., statements from proposed witnesses, were found to be "relevant and material to the issue to be tried" (*Id.*, at 518).

the language of Section 10(l), and its legislative history confirms this conclusion,[10] that it is mandatory upon the Board agent to apply for an injunction if he has reasonable cause to believe that the charge is true and that a complaint should issue. Although reasonable cause is supposed to be derived from an investigation of the charge, there is no point to inquiring into the details of the investigation in the district court for, if the evidence produced in support of the petition establishes that reasonable cause in fact exists, the investigation was necessarily adequate or, if not, no prejudice resulted from its inadequacy. Cf. *Costello* v. *United States*, 350 U.S. 359, 363; *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594, 599–600. Accordingly, as the court below correctly held (Pet. App. A, 8–9), the only relevant issue in a Section 10(l) proceeding is whether "reasonable cause exists to believe a violation has occurred," and that "issue is to be resolved by the evidence adduced by the Board in open court to sustain its petition."

Nor is a different conclusion required by the Board's Statements of Procedure. Section 101.4 of the Statements in effect at the time of the institution of this proceeding (see n. 2, p. 2, *supra*) provides, regarding the investigation of unfair labor practice charges, that: The respondent "is asked to submit a statement of his position in respect to the allegations. The case is assigned to a member of the field staff for investigation, who interviews representatives of the parties and

[10] S. Rep. No. 105, 80th Cong., 1st Sess., p. 27, Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), p. 433.

other persons who have knowledge as to the charges, as is deemed necessary." Appendix A, *infra*, p. 15. However, the "regional director may in his discretion dispense with such portion of the investigation * * * as appears necessary to him in consideration of such factors as the amount of time necessary to complete a full investigation, the nature of the proceeding, and the public interest." Appendix A, *infra*, p. 15. The record shows (pp. 6–7, *supra*) that the investigatory steps listed in the Statements of Procedure were taken here.[11]

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11] This distinguishes the instant case from *Madden v. International Organization of Masters and Pilots*, 259 F. 2d 297 (C.A. 7) (Pet. 13), for there the Board had conceded that it had not complied with the investigation procedure specified in its Statements of Procedure (see Pet. App. A, 9). Similarly, in *National Labor Relations Board* v. *United Brotherhood of Carpenters*, 261 F. 2d 166 (C.A. 7) (Pet. 13), the court found a failure by the Board to comply with the relevant provisions of its rules.

APPENDIX A

1. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: * * * (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

* * * * *

Sec. 10(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court (in-

cluding the United States District Court for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: * * *.

2. The relevant provisions of the Board's Statements of Procedure as amended effective February 16, 1959 (24 Federal Register 1096) are as follows:

Subpart B—Unfair Labor Practice Cases Under Section 10 (a) to (i) of the Act and Telegraph Merger Act Cases

* * * * *

Sec. 101.4 *Investigation of charges.*—When the charge is received it is filed, docketed, and assigned a case number by the region. The regional director will, on request of the charging party, and may in any case cause a copy of the charge to be served upon the person against whom the charge is made, but timely

service of a copy of the charge within the meaning of the proviso to section 10(b) of the act is the exclusive responsibility of the charging party and not of the general counsel or his agents. The regional director requests the person filing the charge to submit evidence in its support. As part of the investigation hereinafter mentioned, the person against whom the charge is filed, hereinafter called the respondent, is asked to submit a statement of his position in respect to the allegations. The case is assigned to a member of the field staff for investigation, who interviews representatives of the parties and other persons who have knowledge as to the charges, as is deemed necessary. In the investigation and in all other stages of the proceedings, charges alleging violation of section 8(b)(4) (A), (B), and (C) are given priority over all other cases in the office in which they are pending except cases of like character, and charges alleging violation of section 8(b)(4)(D) are given priority over all cases except section 8(b)(4) (A), (B), and (C) cases and other cases alleging violation of section 8(b)(4)(D). The regional director may in his discretion dispense with any portion of the investigation described in this section as appears necessary to him in consideration of such factors as the amount of time necessary to complete a full investigation, the nature of the proceeding, and the public interest. After investigation, the case may be disposed of through informal methods such as withdrawal, dismissal, and settlement; or, the case may necessitate formal methods of disposition. * * *

* * * * *

APPENDIX B

The relevant portions of the transcript of hearing before the district court are as follows:

[331] The COURT. Well, I am going to rule now.

It would seem to me that if, under statutory provisions, and perhaps even under provisions of regulations that govern the Board's procedure, there were conditions which would require, in a proceeding of this kind, after the charge had been filed with the Board, that the respondent be given an opportunity to respond to that charge or to explain it, under those circumstances it might be considered a condition precedent—as it was in the Madden v. Masters case—to the filing of a petition for injunction pending final determination by the Board, and that, as [332] the Court of Appeals pointed out, inquiry as to whether or not that condition was met might be appropriate, or, as the court said, "might not be amiss"; I believe those were the words.

But since there has been an amendment [of the Board's Statements of Procedure], there seems to be no condition that the Board must meet with respect to notice or an opportunity to the respondent to explain or to show cause why the proceedings should not go forward. I repeat, if this were a mandatory condition either laid down by the statute or by regulation, I would think that it would be a requirement of due process for that condition to be met, and inquiry certainly could be made with respect thereto. How else could we determine whether or not that condition were met? But since there has been an amendment, then it seems to me that all of the other

regulations to which Mr. Mamet has referred have to do with the internal procedure of the Board, as to how it conducts its investigations and how it processes the charge. They may have to do with the regulation of the Board and its employees, its attorneys, and its in-[333]vestigators. But how can it affect the rights of the parties and of the public whether or not those procedures were fully complied with, as long as it does not affect any requirement that the respondent be given an opportunity to explain in advance or to make a showing?

So far as reasonable cause is concerned, I think that the matter has been settled or at least the reasoning in the Sperry and the Green cases is sufficient to answer that contention. It seems to me that what is reasonable cause equates whether there should or should not be an injunction issued. If the evidence is sufficient and the law is with the petitioner, the Board, then that equates to the conclusion that there was reasonable cause. If the injunction is denied on the facts and the law, then there was not reasonable cause.

I don't perceive that on that requirement of reasonable cause an inquiry as to what was in the mind of the Board or the regional director has to be gone into, that is, as to what was the thinking of the Board or the regional director prior to the time he [334] filed the charge or the petition, or what facts he had before him at that time. I think that is essentially what these two cases that I have just alluded to hold.

It seems to me that the case of Touhy v. Ragen must be and has to be applied in this case, and is pertinent. I have one other case in mind in ruling. It is Appeal of United States Securities & Exchange Commission, 226 F. 2d (a Sixth Circuit case), in which the court said, in part:

> It is true, as argued by appellees, that "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers," * * * and that it is "the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system," * * * but it should be borne in mind that the Supreme Court has explicitly said that, just as a judge cannot be subjected to scrutiny as to mental processes and his examination would be destructive of judicial [335] responsibility, so also the integrity of the administrative process must be equally respected; * * *.

It seems to me that what is being inquired about here is the internal machinery, the mental process that the Board went through before his charge was filed. What happened with regard to an investigation and what investigation was made are all part of the administrative procedure leading up to the filing of a charge. Certainly the United States Attorney doesn't need to answer as to what facts he considered before he filed an information or before he presented a matter before the grand jury. It seems to me the same reasoning should be applied in this kind of a proceeding.

For those reasons, and because of the regulation which prevent employees from testifying, unless given specific authority, I am going to sustain the objection.

It may be that there are specific kinds of evidence in the Board's file that must be produced, and already the Board has produced [336] certain of its files without any mandatory ruling to that effect. But to make inquiry as to what kind of investigation was conducted before the Board filed its charge it seems to me is not only not relevant but it is the very thing that the regulation was designed to preclude, and that

there is a reason for it; otherwise the Government's files would be open to inspection and to the subpoenaing of things that are not relevant to the issue. Certainly, private parties need not, ordinarily, show what led them to file a lawsuit, and I see no reason why the Government should be required to make a disclosure of that nature. I think that's the reason for the regulation, and the courts have held these regulations valid.

For the reasons stated, I am going to sustain the objection to the witness testifying.

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